SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 686

GUY A. THOMPSON, TRUSTEE OF THE MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION,

Petitioner,

vs.

LOUISE F. McPHERSON, ADMINISTRATRIX OF THE ESTATE OF JASON B. McPHERSON, DECEASED.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Springfield Court of Appeals has not been officially reported. The cause is therein titled "Louise *F. McPherson, Administratrix of the Estate of Jason B. McPherson, deceased, respondent,* v. *Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a corporation, appellant, No.* 6354", and is reported in 164 S. W. 2d 80.

II.

Statement as to Jurisdiction.

The petitioner, in support of the jurisdiction of this Court, to review the above cause on writ of certiorari, respectfully states:

A.

Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of this Court is based upon Section 237, Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 344), which provides as far as here pertinent as follows:

> "It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority, and with like effect as is brought up by writ of error, any cause wherein a final judgment has been rendered by the highest court of a State in which a decision could be had * * * where any title, right, privilege or unity, specially set up or claimed by either party under * * * any statute of * * * the United States."

Title 28, Section 350, U. S. Code, provided as far as pertinent:

> "Sec. 350. Time for Making Application for Writ of Error, Appeal, or Certiorari; Stay Pending Application for Certiorari.—No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

B.

Date of Judgment of State Court.

The judgment sought to be reviewed was rendered on July 27, 1942 (R. 73). The petitioner herein filed a motion for rehearing and a motion to modify the opinion in the cause in which the judgment was rendered on August 1, 1942, which was within the ten day period prescribed by Rule 23 of the Springfield Court of Appeals for filing such motions. Said motions were overruled on August 24, 1942 (R. 80), and on September 17, 1942, the petitioner herein applied to the Supreme Court of Missouri for a writ of certiorari to review the judgment of the Springfield Court of Appeals in said cause. The said application for certiorari to the Supreme Court was within the thirty-day period prescribed by the Supreme Court practice (*State ex rel. Berkshire* v. *Ellison,* 287 Mo. 654). The Supreme Court of Missouri en banc denied the said application for certiorari on November 12, 1942 (R. 101), and the judgment of the Springfield Court of Appeals thereby became final.

The three-month period for making this application starts to run with the date of the refusal of the Missouri Supreme Court to review the judgment of the Court of Appeals (*American Ry. Exchange Co.* v. *Levee,* 263 U. S. 19).

The Springfield Court of Appeals is a court of final jurisdiction where the amount involved does not exceed $7,500.00 (Sec. 2078, R. S. Mo. 1939). Said court was created by an Act of the Legislature of Missouri, being Section 2071, R. S. Mo. 1939, pursuant to Section 3 of the Amendment of 1884 of the Constitution of Missouri. By Section 8 of the Amendment to the Missouri Constitution of 1884, supra, it is provided:

> "The Supreme Court shall have superintending control over the Courts of Appeals by mandamus, prohibition and certiorari."

So that by the refusal of the Supreme Court of Missouri to review the decision and opinion of the Springfield Court of Appeals in said case, that decision became a final judgment of the highest court of the State in which a decision could be had (*Mitchell* v. *Joplin National Bank*, 231 S. W. 903, not officially reported; and *First National Bank, etc.* v. *Missouri Gas Company*, 243 Mo. 409) within the provision of the Federal Statute hereinbefore quoted.

The Court has expressly so held in the case of *Mergenthaler Linotype Co.* v. *Davis*, 251 U. S. 256, and has reviewed the judgments of the Springfield Court of Appeals in other cases, examples of which are *Duncan* v. *Thompson, Trustee*, 315 U. S. 1, 62 S. Ct. 422.

C.

Nature of Case and Ruling Below.

This was a suit for wrongful death under the Federal Employers' Liability Act. The deceased was the foreman of the section crew, riding at the front of a motorized handcar, and in complete control of it, and the car was struck by a truck at a public highway crossing. Before entering onto the crossing the deceased had looked in all directions and had signalled the operator of the motor car to proceed across the highway. The petition charged several grounds of negligence (R. 3) but the sole charge of negligence therein which was submitted to the jury under plaintiff's Instruction No. 1 (R. 55) was negligence of the operator of the motor car, Strohm, in failing to stop the motor car before colliding with the truck after he saw or could have seen the truck approaching the crossing, slipping and sliding, and out of the driver's control. The Court of Appeals in its opinion declined to notice or consider the decisions of this Court (of which *Unadilla Valley Ry. Co.* v. *Caldine* is an example) which involved similar facts, and

held that the driver, Strohm, was negligent in failing to stop although he had been ordered to cross the highway by the deceased (R. 78), and although two witnesses, who were the only ones who testified on the point, said that the driver of the motor car could not tell whether to attempt to stop or to attempt to cross in front of the sliding truck. The petitioner contended in the courts below that the evidence did not show any negligence on his part, and that the verdict rested upon speculation and conjecture, and that under the decisions of this Court the finding of negligence under the Federal Employers' Liability Act had to take into account the relation between the parties, and that the deceased McPherson was chargeable with the alleged negligence of the driver Strohm. These contentions were denied by the Court of Appeals. The Court of Appeals failed to consider or accept the interpretation of the Federal Employers' Liability Act made by this Court in the following cases:

Unadilla Valley Ry. Co. v. *Caldine,* 278 U. S. 139, 49 S. Ct. 91;

Frese v. *C., B. & Q. Ry. Co.,* 263 U. S. 1, 44 S. Ct. 1;

Davis v. *Kennedy,* 266 U. S. 147, 45 S. Ct. 33;

St. Louis S. W. Ry. Co. v. *Simpson,* 286 U. S. 346, 52 S. Ct. 520;

Great Northern Ry. Co. v. *Wiles, Admr.,* 240 U. S. 444, 36 S. Ct. 406.

It failed to consider the decisions of this Court that recovery under the Act may not rest upon speculation and conjecture.

Penn. R. Co. v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391;

Gulf, M. & N. R. Co. v. *Wells,* 275 U. S. 455, 48 S. Ct. 151;

So. R. Co. v. *Walters,* 284 U. S. 190, 52 S. Ct. 58;

N. Y. Central R. Co. v. *Ambrose,* 280 U. S. 486, 50 S. Ct. 198;
Patton v. *T. & P. Ry. Co.,* 179 U. S. 658, 21 S. Ct. 275;
C., M. & St. P. Ry. Co. v. *Coogan,* 271 U. S. 472, 46 S. Ct. 564.

D.

Cases Believed to Sustain Jurisdiction.

In actions under the Federal Employers' Liability Act this Court will examine the record and reverse the judgment if the evidence is insufficient in kind or amount as a matter of law to show negligence.

C., M. & St. P. Ry. Co. v. *Coogan,* 271 U. S. 472, 46 S. Ct. 564;
Gulf, M. & N. R. Co. v. *Wells,* 275 U. S. 455, 48 S. Ct. 151;
Atlantic Coast Line R. Co. v. *Davis,* 279 U. S. 34, 49 S. Ct. 210;
Atlantic Coast Line R. Co. v. *Driggers,* 279 U. S. 787, 49 S. Ct. 490;
So. Ry. Co. v. *Moore,* 284 U. S. 581, 52 S. Ct. 38;

and will examine the record and reverse where a case rests upon speculation and conjecture,

Gulf, M. & N. R. Co. v. *Wells,* 275 U. S. 455, 48 S. Ct. 151;
Patton v. *T. & P. Ry. Co.,* 179 U. S. 658, 21 S. Ct. 275;
C., M. & St. P. Ry. Co. v. *Coogan,* 271 U. S. 472, 46 S. Ct. 564.

Likewise, where a court fails to accept the interpretation of this Court of the Federal Employers' Liability Act, this Court will review the action and apply the proper remedy.

C. & O. Ry. Co. v. *Kuhn,* 284 U. S. 44, 52 S. Ct. 45.

III.

Statement of the Case.

The facts on which the Springfield Court of Appeals relied are set out under heading "A" in the petition for writ of certiorari, and in the interest of brevity the statement is not repeated.

IV.

Specification of Errors.

1. The said Court erred in failing to hold that under the record the deceased McPherson was primarily responsible for the crossing of the highway in safety and was the alter ego of the petitioner, and that the negligent acts, if any, of the driver of the motor car were in law the acts of the deceased.

2. The Springfield Court of Appeals erred in holding that there was evidence of negligence on the part of the defendant.

3. Said Court erred in failing to find that under the record the verdict was based upon speculation and conjecture.

V.

ARGUMENT.

Summary of the Argument.

1. The opinion does not follow the decisions of this Court on the question of negligence under the Federal Employers' Liability Act.

2. Under the record there was no proof of negligence on the part of the defendant.

3. The opinion below is based upon speculation and conjecture.

ARGUMENT.

A.

This Court has held that it will review the decision of a state court which fails to accept its interpretation of the Federal Employers Liability Act, and apply the proper remedy. (*C. & O. Ry. Co.* v. *Kuhn, supra.*)

The Springfield Court of Appeals has failed to follow this Court's construction of the Act in determining the question of negligence and has overlooked the relationship between the parties. It was the duty of the deceased McPherson, according to the lower Court's opinion, to ride the front of the motor car where he could observe the movements of the motor car (R. 75), but the opinion does not fully state the duty, as shown by the record. All of the evidence offered in the case was offered by the plaintiff and plaintiff's witness, Hanes, testified (R. 25) that it was McPherson's duty as foreman "to see that the highway was clear and that you could get across it before he permitted the operator of the motor car to start across it. In the position that he sat he had the most advantageous position to see whether there was anything on the highway that interfered." And again (R. 26) Mr. Hanes testified that "it was his motor car and he was in charge of it and everybody on it was required to do what he said. It was his duty to keep a vigilant lookout at highway crossings for vehicular traffic or any kind of traffic." Hanes was himself a foreman but on this day was working on the section crew under McPherson. The opinion of the court below finds that the motor car approached the highway crossing at a speed of about 4 miles an hour and that when within 6 or 8 feet of the crossing the deceased McPherson signaled

to the driver of the motor car to come on and go across the crossing and that just before the motor car started over the crossing the deceased McPherson had looked to the West and then to the East and had then motioned Strohm, the operator, to come on across, and it was the deceased McPherson's duty when he came to this crossing to signal the operator whether or not he should go on across. The Court of Appeals, notwithstanding the positive testimony of every witness who testified about the duty, said that because Strohm, the driver of the motor car, would have to perform the mechanics of applying the brakes, the deceased McPherson was not in the absolute control of the motor car. The opinion in this respect clearly fails to follow this Court's decision in *Unadilla Valley Ry. Co.* v. *Caldine*, 278 U. S. 139. That was an action under the Federal Act by the administrator of a deceased conductor who was killed when his train collided with another train. The conductor had orders to take a siding to allow another train to pass but after reaching the siding, and instead of waiting as his orders required him to do, he directed the train to go on. It was claimed that as the motorman knew the other train was on the way, the motorman should have refused to obey the conductor and that his act in physically starting the car was more immediately connected with the collision than the order of the deceased. That is the same position taken by the Court of Appeals but this Court expressly disallowed such a contention and held that the railroad was not liable, and used this language:

> "The phrase of the statute, 'resulting in whole or in part,' admits of some latitude of interpretation and is likely to be given somewhat different meanings by different readers. Certainly the relation between the parties is to be taken into account. It seems to us that Caldine or one who stands in his shoes is not entitled as against the Railroad Company that employed him to

> say that the collision was due to any one but himself. He was in command. He expected to be obeyed and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the Company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts."

In the case of *Frese* v. *C., B. & Q. Ry. Co.*, 263 U. S. 1, the action was under the Federal Employers Liability Act for the death of an engineer caused by a collision in Illinois between trains. The statute in Illinois required the engineer to ascertain that the way was clear and that a train could safely cross. The Missouri Supreme Court held that since the engine was under the control of the engineer who was killed that there could be no recovery, and this Court affirmed. Answering the contention that there was negligence of a subordinate who could have averted the injury, this Court said:

> "Moreover the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice he could not escape this duty, and it would be a perversion of the Employers' Liability Act (April 22, 1908, Ch. 149, Sec. 3, 35 Stat. 65, 66 (Comp. St., Sec. 8659)) to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more. See Great Northern Ry Co. *v.* Wiles, 240 U. S. 444, 448, 36 S. Ct. 406, 60 L. Ed. 732. If the engineer could not have recovered for an injury his administratrix cannot recover for his death."

There can be no difference in principle between the violation of a statute by an employee and the violation of the

positive duty of the deceased employee to see that the highway was clear before entering upon it. If the driver Strohm could have done anything to have averted the collision, then it is certain that the deceased, his superior, could have ordered the same action on his part.

In *Davis* v. *Kennedy*, 266 U. S. 147, the deceased was an engineer on a train and was killed in a collision with another train. The other train had the right of way and the crew had instructions never to pass a certain station unless they knew as a fact that the other train had passed it. The engineer ran his train beyond the stop and the collision occurred. It was contended that there was negligence of other employees in failing to maintain a lookout, just as the Court of Appeals held there was negligence on the part of Strohm. But this Court rejected that contention and used this language:

> "The trial was in a Court of the State of Tennessee, and the plaintiff got a judgment which was sustained by the Supreme Court of the State on the ground that the other members of the crew as well as the engineer were bound to look out for the approaching train and that their negligence contributed as a proximate cause to the engineer's death. We are of the opinion that this was error. It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more. *Frese* v. *Chicago, Burlington & Quincy R. R. Co.*, 263 U. S. 1, 3, 44 S. Ct. 1, 68 L. Ed. 131."

In *St. Louis Southwestern Ry Co.* v. *Simpson*, 286 U. S. 346, the action was by the administrator of the estate of an

employee to recover damages for wrongful death under the Federal Act. The deceased was the engineer. He had received a written order to proceed to a certain crossover and wait until another train arrived. He did not wait but moved on to the main line and the collision occurred. It was claimed that recovery could be had under the last chance doctrine due to the fact that the brakeman had remembered the orders and had called out to apply the air brakes but the conductor refused to permit this to be done until he looked over the orders and while he was reading them the collision occurred. This Court said that the facts so summarized were insufficient to relieve the engineer from the sole responsibility of the casualty which resulted in his death.

In *Great Northern Ry. Co.* v. *Wiles, Administrator,* 240 U. S. 441, the action was under the Federal Act and brought by the administrator of the deceased brakeman. The train had broken in two on a sharp curve and at that time the deceased was in the caboose. It was his duty to have then gone back to protect the rear end of the train, that is, he should have gone back and flagged the passenger train, which he failed to do, and the passenger train ran into the caboose and caused his death. This Court held that his disregard of duty prevented a recovery.

The Springfield Court of Appeals gave no consideration to these cases although they were called to its attention in petitioner's brief and in his motion for rehearing. These decisions show that the opinion of that Court is wrong in failing to hold that the deceased's own act was the cause of his death. Deceased had a positive and primary duty to control the movement of the motor car at and over the crossing and, as stated in the Davis case, it would be a perversion of the Federal Employers' Liability statute to allow a recovery for an injury directly due to his failure to act, on

the ground that it might have been prevented if those in secondary relation to the movement had done more.

The situation in this record fits the holding in the Caldine case exactly. The deceased was the alter ego of the petitioner. He was in command. He was obeyed, and he ought not to be heard to say that his subordinate, the driver of the motor car, ought not to have done what he ordered.

B.

It is likewise established by the decisions of this Court in *C. M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, and many other decisions hereinbefore cited, that the Court will examine the record to determine whether the evidence is sufficient in kind or amount as a matter of law to show negligence. The sole ground of negligence submitted was the failure of the driver, Strohm, to stop the motor car before colliding with the truck (R. 56). The record shows that just before starting over the crossing the deceased had looked both to the West and to the East and had motioned the driver of the motor car to come on across (R. 75), and that the deceased was in the best position to see the highway and it was his duty to see that the crossing could be safely crossed. Now, it could not be negligence for the driver of the car to proceed over the highway crossing as directed so to do by his superior, and while his superior remained in a position where he could best see the highway's condition. For aught it appears that the deceased was alert and saw the approaching truck and concluded that the way to avoid a collision was for the motor car to move ahead. There could be no negligence on the part of the driver Strohm in obeying the orders of his superior and no duty can be said to rest upon Strohm to act independently of the deceased, his superior, in the very presence of his superior.

C.

Furthermore, both section foreman Hanes (R. 25) and witness McFarland (R. 20), both experienced railroad men, testified that if the truck had come on the right hand side of the highway without the brakes being applied, the motor car would have had plenty of time to have crossed in front of it, and each testified that from the time that the truck was 100 feet from the crossing, which is the point where the driver of the truck said he applied his brakes and it began to skid, you couldn't tell whether the truck was going to hit the motor car or get off in front of it, and that the driver of the motor car wouldn't have known what to do; that he couldn't tell whether to go ahead or try to stop, and the witness McClenagan, the driver of the truck, testified (R. 28) that when his car began to slip he headed it to the North, and that he thought if he turned to the North he would give the motor car time to go by.

This testimony was not considered by the Court of Appeals, but it shows, as we think, that even if there had been any duty on Strohm to maintain a lookout at the highway crossing, it could not be said that he was negligent in failing to apply the brakes; apparently the safest course was to attempt to get on in front of the truck.

And it is not enough that a case rests on speculation and conjecture. *Gulf M. & N. R. Co.* v. *Wells,* 275 U. S. 455, and cases hereinbefore cited. The record shows that the verdict rests upon speculation. There was no evidence as to whether the driver Strohm saw the aproaching truck or not, nor whether he did anything, but it was shown that the motor car didn't change its speed very much and that it could have been stopped by the use of the brakes within a distance of 6 to 10 feet. But the record does not show that if the motor car had been stopped it would have averted the collision. It is purely a matter of guess work as to

whether the collision would have been averted if the driver Strohm had applied the brakes, so the whole case rests upon conjecture and speculation.

WHEREFORE, it is respectfully submitted that the petition herein prayed for should be granted and that a writ of certiorari should be granted and that this Court review the decision of the Springfield Court of Appeals in said cause.

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